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**COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION ONE**

SAYED ZIA EHSANI, a single man,
Appellant,

GUITTY ZAMANI, a single woman,
Cross-Appellant,

vs.

THE MCCULLOUGH FAMILY
PARTNERSHIP, et al.
Respondents.

Appeal No. **53645-1-I**

Trial Ct # 97-2-30285-4 SEA
King County Superior Court

OPENING BRIEF
OF
CROSS-APPELLANT
GUITTY ZAMANI

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 **ORIGINAL**

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PARTIES TO THIS APPEAL

The parties are:

- Sayed Zia Ehsani (“Ehsani”), appellant on appeal / plaintiff below.
- Guity Zamani (“Zamani”), cross-appellant on appeal / co-plaintiff below.
- David Dillard Cullen, Attorney at Law (“Cullen”). Mr. Cullen is a party in interest on this appeal. He was attorney of record for the defendants below.
- The McCullough Family Partnership, The McCullough Group Inc., David E. McCullough, Chong R. McCullough, and Edward F. McCullough (collectively referred to as “McCulloughs”). Respondents on appeal / defendants below.

I. SYNOPSIS OF THE CASE

A judgment was entered in favor of defendants. Following entry of judgment, the defendants’ attorney obtained payment of \$77,900.00 from plaintiff pursuant to the judgment. Plaintiff Ehsani appealed from the judgment. Co-plaintiff Zamani cross-appealed. This court reversed the judgment in its entirety. On remand, plaintiff Ehsani filed further proceedings in the trial court consistent with this court’s decision in the prior appeal. Part of the relief requested on remand was that, pursuant to RAP 12.8, the defendants’ counsel, David D. Cullen, be required to restore to plaintiffs the money taken pursuant to the reversed judgments. The trial court denied that relief.

Zamani's interest under this Court's unpublished opinion dated September 23, 2002, in appellate case number 47024-8-I (CP 2 – 11) was given effect by the trial court's Order on Remand as follows:

“The Court of Appeals identifies an additional \$32,377.20 due Zamani from Ehsani for contributions she made to taxes and mortgage arrears to save the property from foreclosure. The dollar amount identified by the Court of Appeals is not disputed.

“The methods of calculating the distribution in the opinion are inconsistent. The court requested supplemental briefing from the Plaintiffs on this point.

“Ehsani declined to file supplemental briefing on this issue. The court has considered the supplemental briefing on this point filed by Zamani. Based thereupon it is

“ORDERED that Zamani shall have judgment against Ehsani for \$32,377.20 from his 38.95% share of the holdback.”
(CP 291 – 293)

Cross-appellant Zamani asks this Court to order that the defendants' counsel, David D. Cullen, restore to Zamani the \$32,377.20 that belongs to Zamani under this Court's prior decision which reversed the judgments under which defendants' counsel obtained possession of these funds.

Zamani's request for relief in this appeal is made pursuant to RAP 12.8 and the case of *In re Mason*, 48 Wn. App. 688, 740 P.2d 356, review denied, 109 Wn.2d 1012 (1987).

II. ASSIGNMENTS OF ERROR

The trial court erred in making the following rulings:

“2. DISGORGEMENT OF FEES FROM DEFENDANTS’ COUNSEL

“Plaintiff has made a Motion for Restitution of funds paid Defendant’s counsel after trial from the holdback fund. The court has considered the Defendant’s response and supporting documentation filed under seal. It is herewith

ORDERED that restitution of funds paid to the Defendants’ counsel is DENIED.”
(CP 292)

III. ISSUES RELATING TO ASSIGNMENTS OF ERROR

Did the trial court err in failing to order that defendants’ counsel David D. Cullen restore the funds he obtained pursuant to the judgments that were reversed by this Court’s prior decision in this matter?

IV. STATEMENT OF THE CASE

The following orders were entered in favor of respondents (defendants) McCulloughs against appellant (plaintiff) Ehsani on June 22, 2000, in King County Superior Court case number 97-2-30285-4 SEA:

ORDER AWARDING ACCOUNTANT FEES in the sum of \$8,951.50 (CP 306 – 307);

ORDER AWARDING ATTORNEY FEES in the sum of \$97,459.00. (CP 308 – 309)

ORDER TO DISBURSE PURSUANT TO JUDGMENT. (CP 315 – 316)

An AMENDED JUDGMENT was entered on June 27, 2000, providing, in relevant part (CP 341 – 342) that:

“6. The defendants McCullough are awarded judgment against the plaintiff Zia Ehsani in the sum of \$97,459.00 as and for their reasonable attorney fees herein.

“7. The defendants McCullough are awarded judgment against the plaintiff Zia Ehsani in the sum of \$8,951.50 for expert accountant fees reasonably incurred in responding to and defending against Zia Ehsani’s claims herein.

* * * *

“9. The plaintiff Zia Ehsani is awarded \$77,900.00 (plus 38.95% of any accrued interest) of the \$200,000.00 sales proceeds hold-back at First American Title Insurance Company, 13010 NE 20th Street, Suite A, Bellevue, WA under the following described escrow:

Sale of La Residence Suite Hotel
Escrow No: 35258RGI
Purchaser: Earl Diller UTA
Seller: Guitty Zamani

“10. In partial satisfaction of the judgments awarded to the Defendants McCullough against Plaintiff Zia Ehsani, the court hereby directs that Zia Ehsani’s \$77,900.00 (plus 38.95% of any accrued interest) share of the \$200,000 sales proceeds hold-back at First American Title Insurance Company, 13010 NE 20th Street, Suite A, Bellevue, WA under the following described escrow be paid over to the Defendants McCullough:

Sale of La Residence Suite Hotel
Escrow No: 35258RGI
Purchaser: Earl Diller UTA
Seller: Guitty Zamani

“11. The \$77,900.00 (plus 38.95% of any accrued interest) to be paid over to Defendants McCullough under the preceding paragraph 10 of this judgment shall be paid by escrow directly to the Defendants McCulloughs through their attorney of record, David D. Cullen, by

An AMENDED JUDGMENT was entered on June 27, 2000, providing, in relevant part, that:

“6. The defendants McCullough are awarded judgment against the plaintiff Zia Ehsani in the sum of \$97,459.00 as and for their reasonable attorney fees herein.

“7. The defendants McCullough are awarded judgment against the plaintiff Zia Ehsani in the sum of \$8,951.50 for expert accountant fees reasonably incurred in responding to and defending against Zia Ehsani’s claims herein.

* * * *

“9. The plaintiff Zia Ehsani is awarded \$97,900.00 (plus 61.05% of any accrued interest) of the \$200,000.00 sales proceeds hold-back at First American Title Insurance Company, 13010 NE 20th Street, Suite A, Bellevue, WA under the following described escrow:

Sale of La Residence Suite Hotel
Escrow No: 35258RGI
Purchaser: Earl Diller UTA
Seller: Guitty Zamani

“10. In partial satisfaction of the judgments awarded to the Defendants McCullough against Plaintiff Zia Ehsani, the court hereby awards \$77,900.00 (plus 38.95% of any accrued interest) of the \$200,000 sales proceeds hold-back at First American Title Insurance Company, 13010 NE 20th Street, Suite A, Bellevue, WA under the following described escrow:

Sale of La Residence Suite Hotel
Escrow No: 35258RGI
Purchaser: Earl Diller UTA
Seller: Guitty Zamani

“11. The \$77,900.00 awarded to Defendants McCullough under the preceding paragraph 9 of this judgment shall be paid by escrow directly to the Defendants McCulloughs through their attorney of record, David D. Cullen, by check made payable to the DAVID D. CULLEN ATTORNEY CLIENT TRUST ACCOUNT. The full

amount of such payment shall be applied in partial satisfaction of the judgments awarded to Defendants McCullough against Plaintiff Zia Ehsani under paragraphs 6 and 7 of this judgment.

Cullen filed an *Application for Writ of Garnishment* on August 3, 2000, against the garnishee defendant First American Title Insurance Company, Escrow Number: 35258RGI. The writ recites, inter alia, that “a payment of \$50,000 was received on July 3, 2000 which leaves a remaining balance of \$56,413.50”. (CP 347 – 348)

An *Answer to Writ of Garnishment* was filed on September 14, 2000, which recites that the garnishee defendant holds \$27,900.00 owing to Ehsani described as “Escrow funds in amount of \$27,900.00.” (CP 350 – 352)

On October 17, 2000, Cullen filed a *Partial Satisfaction of Judgment* which recites, inter alia, that:

“* * * the Judgment Creditor in the above-entitled action hereby acknowledges partial satisfaction of the judgment recovered against SAYED ZIA EHSANI, the Judgment Debtor hereon, on the 3rd of July, 2000 in the sum of \$50,000, and \$27,900.00 on the 10th day of October, 2000, for a total of \$77,900.00, received from First American Title Insurance Company, * * *.”
(CP 353 – 357)

In his affidavit dated December 10, 2003, defendants’ counsel David D. Cullen admits that he applied these funds in payment of his attorney fees and some other items. (CP 273 – 275)

Ehsani appealed. Zamani cross-appealed. This court issued its unpublished opinion on September 23, 2002, in appellate case number 47081-7-I

reversing the judgments mentioned above. (CP 2 – 11). The mandate issued on November 1, 2002. (CP 1)

On remand, Ehsani filed a *Motion for Restitution Order* on August 18, 2003 asking the trial court to require defendants' counsel David Dillard Cullen to restore, pursuant to RAP 12.8, the \$77,900 he obtained possession of from the First American Title escrow "hold-back fund", plus interest at 12% per annum. (CP 158 – 160) The motion was supported by the *Affidavit of Sayed Zia Ehsani* (CP 37 – 135), the *Declaration of Thomas Olmstead* (CP 136 – 157), and was accompanied by a document titled *Plaintiff's Motion for Summary Judgment*. (CP 161 – 164)

McCulloughs responded to Ehsani's motion as follows:

Affidavit of David McCullough filed September 2, 2003, (CP 170 – 175);

Defendant's Memorandum in Support of Motion to Strike filed September 2, 2003 (CP 176 – 179);

Defendant's Reply Brief in Opposition to Plaintiff Ehsani's Motion for Restitution Order filed September 2, 2003, (CP 180 – 187)

Affidavit of David McCullough filed September 2, 2003 (CP 190 – 200).

The trial court issued an *Order on Status Conference* on October 16, 2003. (CP 203 – 204) The parties filed the following additional materials with the court:

Plaintiff Zamani's Proposal on Reimbursement of \$32,377.20 from Ehsani's Share of Hold-Back Funds. (CP 205 – 207)

Declaration Reply of Appellant Ehsani to Brief of Guitty Zamani. (CP 208 – 227)

The parties appeared in the trial court on November 25, 2003. No testimony was taken. There was no trial that day. There was colloquy between the court and counsel. Defendants' counsel informed the court that defendants David McCullough and Chong McCullough had filed a joint personal chapter 7 bankruptcy petition and that defendant Edward McCullough has or would soon be filing his own chapter 7 bankruptcy. The current status of these bankruptcy cases is not known.

On November 25, 2004, the court set a schedule for additional briefing.

(CP 228) The parties filed the following additional documents:

Declaration of Thomas Olmstead filed 12/10/2003. (CP 249 – 250)

Defendant's Supplemental Brief in Opposition to Plaintiff Ehsani's Motion for Restitution Order filed 12/11/2003. (CP 253 – 286)

Plaintiff Zamani's Further Memorandum regarding Reimbursement of \$32,377.20 From Ehsani's Share of Hold-Back Funds filed 12/11/2003. (CP 287 – 290)

On December 12, 2003, the trial court considered the matter on the record without oral argument and that day issued its *Order on Remand From Appeal on Attorney Fees, and Apportionment of HoldBack Fund* (CP 291 – 293), which provides, in relevant part, that:

“The parties appeared before the court for a preliminary discussion for implementation of the remand order on November 25, 2003 and oral argument. The court requested

additional briefing and documentation for consideration without further oral argument for December 12, 2003. Some of the defendants have filed for bankruptcy.

* * * *

“2. DISGORGEMENT OF FEES FROM DEFENDANTS’ COUNSEL

“Plaintiff has made a Motion for Restitution of funds paid Defendant’s counsel after trial from the holdback fund. The court has considered the Defendant’s response and supporting documentation filed under seal. It is herewith

ORDERED that restitution of funds paid to the Defendants’ counsel is DENIED.”

(CP 291 – 293)

V. ARGUMENT AND AUTHORITIES

The trial court erroneously failed to require that the funds taken under the reversed judgment be restored to appellants

RAP 12.8 requires that the funds taken from appellants by defendants under the judgments that were reversed in the prior appeal be restored to appellants. RAP 12.8 provides that:

“If a party has voluntarily or involuntarily partially or wholly satisfied a trial court decision which is modified by the appellate court, the trial court shall enter orders and authorize the issuance of process appropriate to restore to the party any property taken from that party, the value of the property, or in appropriate circumstances, provide restitution. * * *.”

This Court dealt with the application of RAP 12.8 under circumstances similar to this matter in the case of *In re Marriage of Mason*, 48 Wn. App. 688; 740 P.2d 356, review denied, 109 Wn.2d 1012 (1987). As in *Mason*, restitution

of the attorney fees paid Mr. Cullen from the appellants' escrowed funds is a matter of right under RAP 12.8. It does not matter that Mr. Cullen is not a party to the action. He caused the appellants' funds to be paid over to him pursuant to the judgments which were later reversed. He applied those funds in payment of his fees. He was on notice that RAP 12.8 requires such funds to be restored to appellants upon reversal of the judgments. If he dissipated those funds he did so at his own risk. See *State v. A.N.W. Seed Corp*, 56 Wn. App. 763; 769, 785 P.2d 838 (1990), where the court said,

“Even though a bond is not filed, if the judgment creditor elects to sell the judgment debtor's property prior to completion of the appeal process, **the judgment creditor must bear the risk of the consequences of a reversal and may be required to restore the property or its fair market value.** RAP 12.8.”
(emphasis added)

On December 11, 2003, Mr. Cullen submitted documents, which he describes as follows, to the trial court for consideration *in camera* and failed to provide a copy to counsel for either Ehsani or Zamani:

- Trust account ledger card for the McCulloughs;
- Trust account statements for the pertinent period;
- Copies of front and back of all of the trust account checks written on this account.

(CP 261 – 262; CP 274)

- Mr. Cullen's fee agreement with the defendants McCullough.

(CP 275)

Mr. Cullen's affidavit states that disbursements, in amounts not disclosed, were made from this trust account to:

- Frost & Company
- David D. Cullen, Attorneys & Counselors
- David McCullough
- ABC Legal Messengers
- The Court of Appeals

(CP 274)

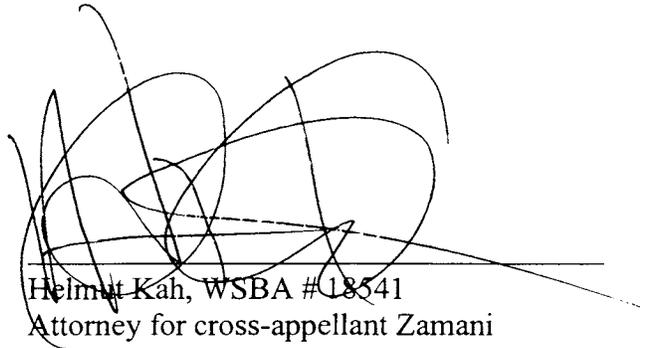
Mr. Cullen provided these documents to the trial court with the original of his December 10, 2003, declaration that was filed on December 11, 2003, (CP 273 – 275). A party cannot both claim the attorney-client privilege as to certain documents and information and at the same time use those documents and information as *secret* evidence to be seen and considered only by the court but not opposing counsel. The privilege against disclosure of communications between attorney and client is waived as to the whole of the communication by the client's offer of his own or the attorney's testimony as to a part of it. *Martin v. Shaen*, 22 Wn.2d 505; 513, 156 P.2d 681 (1945)

VI. CONCLUSION

The funds taken by defendants' counsel David D. Cullen under the judgments reversed by the decision in the prior appeal should be ordered restored pursuant to and in accordance with RAP 12.8, at least to the extent of Zamani's

\$32,377.20 interest in those funds. \$32,377.20 of said funds should be ordered restored to Zamani consistent with this Court's decision issued September 23, 2002, in appellate case number 47024-8-I and section 3 of the trial court's Order on Remand dated December 12, 2003. (CP 291 – 293).

Respectfully submitted,



Helmut Kah, WSBA #18541
Attorney for cross-appellant Zamani

PROOF OF FILING AND SERVICE BY MAIL

I hereby certify that on August 4, 2004, I filed and served this brief by mail by depositing a true and complete copy thereof in the US Mail at King County, Washington, with first class postage prepaid, enclosed in separate sealed envelopes addressed to the Court of Appeals, Division One, and to each of the following parties and counsel:

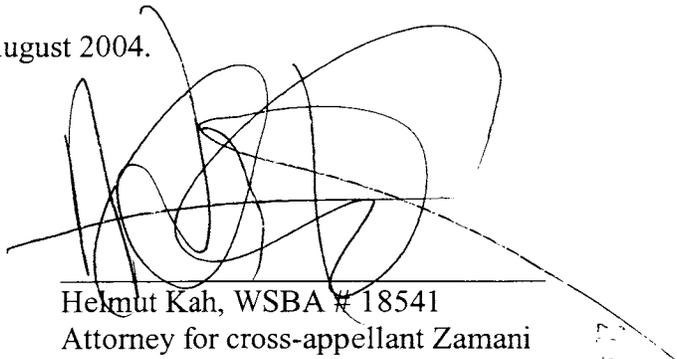
Sayed Zia Ehsani
P.O. Box 22802
Seattle, WA 98122

David D. Cullen
Attorneys & Counselors
West Hills Office Park, Building 11
1800 Cooper Point Road, S.W.
Olympia, WA 98502

Christopher I. Brain
Tousley Brain & Stephens PLLC
700 5th Ave Ste 5600
Seattle, WA 98104-5056

Coreen Rebecca Ferencz
Tousley Brain & Stephens PLLC
700 5th Ave Ste 5600
Seattle, WA 98104-5056

DATED this 4th day of August 2004.



Helmut Kah, WSBA # 18541
Attorney for cross-appellant Zamani

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